Clarity Heights Sdn Bhd v Syarikat Samland Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-512 OF 1995
KAMALANATHAN RATNAM J
9 AUGUST 1999

Contract *— Breach — Wrongful repudiation — Claim for refund of deposit — Allegation of failure to inform of non-requirement of FIC approval within specified time limit — Delay in challenging non compliance — Whether deposit wrongfully forfeited*

The defendant entered into a sale and purchase agreement dated 22 August 1994 ('the SPA') with the plaintiff whereby the defendant agreed to sell and the plaintiff agreed to purchase certain pieces of lands. According to the Third Schedule of the SPA, the plaintiff was to inform the defendant within 30 days of the SPA that the approval of the FIC and the shareholders were not required for the sale and purchase of the lands. By letter dated 19 September 1994, the plaintiff informed the defendant that the approval of the FIC was not required for the sale and purchase of the lands. However, after nearly six months of having been informed of the non-requirement of the FIC's approval, the defendant alleged for the first time that the notice was not given within the stipulated in the SPA. The defendant did not even put to the plaintiff's witness (PW1) that the plaintiff had informed the defendant outside the time stipulated although PW1 had testified that the plaintiff had informed the defendant that FIC's approval was not required within 30 days of the SPA. PW1 also testified that the plaintiff informed the defendant that the approval of the shareholders was not required at the meeting held on 14 October 1994. In fact, the plaintiff had by letter dated 18 October 1994 (CABD 33) confirmed that the defendant had no objection to the late receipt of the notice. However, the defendant caused a letter dated 10 November 1994 to be sent to the plaintiff. The letter was drafted by the legal advisor of the defendant (DW3). This was in conflict with the SPA which specifically prohibited the vendor from being legally represented. The defendant repudiated the SPA by letters dated 10 August 1995 and 21 August 1995 which was accepted by the plaintiff. The plaintiff then commenced an action against the defendant for wrongful repudiation of the SPA and claimed for refund of the deposit and agreed liquidated damages.

Held, allowing the plaintiff's claim for refund of deposit:

(1) The law is trite that a party must expressly put to his opponent's material witness its own case and such a failure might be treated as an abandonment of the pleaded case and if a party in the absence of valid reasons refrains from doing so, then he might be barred from raising it in argument. Further, by taking this challenge nearly six months late, the defendant was therefore

estopped from insisting upon its right of being informed within the time stipulated under the SPA (see p 492A–C). A

(2) The defendant's letter dated 10 November 1994 did not even allege that CABD 33 was not in order and indeed no reference was even made to it. Since the letter was drafted by an advocate and solicitor, it is inconceivable that if the terms in CABD 33 were not acceptable, DW3 would have failed to say so expressly (see p 492E–F). B

(3) Even though PW1 had testified to the effect that DW3 represented the defendant at the meeting on 14 October 1994 and had no objection to the delay in informing the defendant of the non-requirement of the shareholders' approval, PW1 was never challenged on this. Therefore, the defendant was barred from raising the argument that the plaintiff did not inform the defendant of the non-requirement of approval within the stipulated time. Further, the defendant had expressly or impliedly acquiesced and waived the requirement of the need to be informed of the non-requirement of approval within the stipulated time under the SPA (see p 493A–C). C D

(4) In the circumstances, the defendant was not entitled to repudiate the SPA. Such repudiation was a breach of the SPA more so in this case when the plaintiff had fulfilled all its obligations under the SPA save and except for the payment of the balance purchase price which was not due at the time the defendant wrongfully repudiated the SPA (see p 493G–H). E

(5) The plaintiff had failed to consider the effect of s 75 of the Contracts Act 1950 on the claim for agreed liquidated damages. The plaintiff led no evidence as to any loss in respect of this claim or any part thereof. Therefore, this claim was disallowed (see pp 494I, 495B, E–F). F

(6) It is a fact that the plaintiff had indeed paid a deposit of RM556,000 which had been wrongfully forfeited by the defendant. The plaintiff was entitled to this claim with interest at the rate of 4% pa from the date of forfeiture to the date of judgment and cost (see p 495F–G). G

[Bahasa Malaysia summary

H

Defendan memasuki suatu perjanjian jual beli bertarikh 22 Ogos 1994 ('SPA tersebut') dengan plaintif di mana defendan bersetuju menjual dan plaintif bersetuju membeli bidang-bidang tanah-tanah yang tertentu. Menurut Jadual Ketiga SPA tersebut, plaintif dikehendaki memberitahu defendan dalam jangka masa 30 hari dari SPA tersebut bahawa kelulusan FIC dan pemegang-pemegang saham adalah tidak perlu untuk jual beli tanah-tanah tersebut. Melalui surat bertarikh 19 September 1994, plaintif memberitahu defendan bahawa kelulusan FIC tidak perlu untuk jual beli tanah-tanah tersebut. Walau I

bagaimanapun, setelah hampir enam bulan diberitahu tentang tiadanya keperluan untuk kelulusan FIC, defendan mengatakan untuk kali pertamanya bahawa notis tersebut tidak diberikan dalam tempoh seperti yang ditetapkan dalam SPA tersebut. Defendan tidak juga mengemukakan kepada saksi plaintif (PW1) bahawa plaintif telah memberitahu defendan di luar jangka masa yang ditetapkan walaupun PW1 telah memberi keterangan bahawa plaintif telah memberitahu defendan bahawa kelulusan FIC adalah tidak perlu dalam jangka masa 30 hari dari SPA tersebut. PW1 juga memberi keterangan bahawa plaintif memberitahu defendan bahawa kelulusan pemegang-pemegang saham adalah tidak perlu pada mesyuarat yang diadakan pada 18 Oktober 1994. Pada hakikatnya, plaintif telah melalui surat bertarikh 18 Oktober 1994 (CABD 33) mengesahkan bahawa defendan tidak mempunyai bantahan kepada penerimaan lewat notis tersebut. Walau bagaimanapun, defendan telah menyebabkan sepucuk surat bertarikh 10 November 1994 dihantar kepada plaintif. Surat tersebut adalah diderafkan oleh penasihat undang-undang defendan (DW3). Ini adalah bercanggah dengan SPA tersebut yang dengan spesifik melarang penjual daripada diwakili dari segi undang-undang. Defendan menolak SPA tersebut melalui surat-surat bertarikh 10 Ogos 1995 dan 21 Ogos 1995 yang telah diterima oleh plaintif. Plaintif kemudiannya memulakan suatu tindakan terhadap defendan untuk penolakan secara salah SPA tersebut dan menuntut untuk bayaran balik deposit dan ganti rugi jumlah tertentu yang dipersetujui.

Diputuskan, menolak tuntutan plaintif untuk bayaran balik deposit:

(1) Undang-undang adalah amat jelas bahawa suatu pihak mesti secara nyatanya mengemukakan kepada saksi material lawannya tentang kesnya dan kegagalan sedemikian mungkin dianggap sebagai pengguguran kes yang diplidkan dan jika suatu pihak dalam ketiadaan alasan-alasan sah menahan diri daripada berbuat demikian, maka beliau mungkin dilarang daripada membangkit-kannya di dalam hujah. Tambahan lagi, dengan mengambil cabaran ini setelah lewat lebih kurang enam bulan, defendan adalah diestop daripada menegaskan hak-haknya tentang diberitahu dalam jangka masa yang ditetapkan di bawah SPA tersebut (lihat ms 492A–C).

(2) Surat defendan bertarikh 10 November 1994 langsung tidak mengatakan bahawa CABD 33 adalah tidak teratur dan sesungguhnya tiada rujukan pun dibuat tentangnya. Memandangkan surat tersebut adalah diderafkan oleh seorang peguambela dan peguamcara, adalah tidak dapat dibayangkan bahawa jika terma-terma CABD 33 tidak diterima, DW3 akan gagal untuk menyatakan demikian secara nyata (lihat ms 492E–F).

(3) Walaupun PW1 telah memberi keterangan lebih kurang begitu maksudnya bahawa DW3 telah mewakili defendan pada

mesyuarat pada 14 Oktober 1994 dan tidak mempunyai bantahan kepada kelewatan dalam memberitahu defendan tentang tiada keperluan untuk kelulusan pemegang-pemegang saham, PW1 adalah tidak dicabar berkenaan perkara ini. Maka defendan adalah dilarang daripada membangkitkan hujah bahawa plaintif tidak memberitahu defendan tentang tiada keperluan tentang kelulusan dalam jangka masa yang ditetapkan. Tambahan lagi, defendan telah secara nyata atau tersirat bersetuju dan mengenepikan keperluan untuk diberitahu tentang tiada keperluan untuk kelulusan dalam jangka masa yang ditetapkan di bawah SPA tersebut (lihat ms 493A–C).

(4) Di dalam keadaan-keadaan tersebut, defendan adalah tidak berhak untuk menolak SPA tersebut. Penolakan sedemikian adalah suatu kemungkiran SPA tersebut lebih-lebih lagi di dalam kes ini apabila plaintif telah menepati semua tanggungjawab-tanggungjawabnya di bawah SPA tersebut kecuali untuk pembayaran baki harga belian yang masih belum perlu dibayar pada masa defendan secara salah menolak SPA tersebut (lihat ms 493G–H).

(5) Plaintif telah gagal untuk mempertimbangkan kesan s 75 Akta Kontrak 1950 berkenaan dengan tuntutan untuk ganti rugi jumlah tertentu yang dipersetujui. Plaintif tidak memberi sebarang keterangan berkenaan dengan kerugian berkenaan dengan tuntutan ini atau mana-mana bahagiannya. Maka, tuntutan ini adalah ditolak (lihat ms 494I, 495B, E–F).

(6) Adalah fakta bahawa plaintif sememangnya telah membayar deposit sebanyak RM556,000 yang telah disita secara salah oleh defendan. Plaintif adalah berhak kepada tuntutan ini dengan faedah pada kadar 4% setahun dari tarikh penyitaan kepada tarikh penghakiman dan kos (lihat ms 495F–G).]

Notes

For a case on wrongful repudiation, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1963.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Keen Builders Sdn Bhd v Utara Dua (M) Sdn Bhd (Samudra (M) Sdn Bhd, Garnishee) [1998] 2 CLJ Supp 256 (refd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (refd)

Legislation referred to

Contracts Act 1950 ss 40, 75

Yee Teck Fah (*Ong Gek Lin* with him) (*Yee Teck Fah & Co*) for the plaintiff.

KK Lai (*KK Lai & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

The defendant was at all material times the registered owner of various pieces of land held under various grants ('the lands'). The plaintiff and defendant entered into a sale and purchase agreement dated 22 August 1994 ('the SPA') whereby the defendant agreed to sell and the plaintiff agreed to purchase the lands free from all encumbrances and with vacant possession at the purchase price of RM2,780,000 ('the purchase price') and upon the terms and conditions contained in the SPA. Pursuant to the terms of the SPA, the plaintiff paid to the defendant the sum of RM556,000 as deposit and part payment towards the purchase price for the purchase of the lands. The balance of the purchase price of RM2,224,000 ('the balance purchase price') was only payable by the plaintiff three months from the date of the purchaser's receipt of the written notice from the defendant that the defendant had obtained all the necessary undertakings and redemption statements from its financier and that all private caveats and other encumbrances on the lands have been withdrawn through documentary evidence. The sale and purchase of the lands was also subject to the special conditions set out in the Third Schedule thereto which provides as follows:

(a) the vendor(s) shall not be legally represented in this sale and purchase transaction;

(b) the vendor(s) shall endeavour to comply with all requests of the purchaser(s) and the solicitors to enable this sale transaction to be concluded expeditiously bearing in mind that time shall be of the essence of all requests aforementioned;

(c) it is a condition precedent of this sale and purchase transaction that the purchaser(s) shall have first obtained approval(s) in writing of the Foreign Investment Committee consenting to the purchaser(s) purchasing the property(ies) from the vendor(s) (in the event the approval of the aforesaid authority is required). The purchaser(s) shall submit its application within twenty one (21) days from the date of this agreement in the event such approval aforementioned is required;

(d) it is also a condition precedent of this sale and purchase transaction that the shareholders of Chew Piau Bhd (the holding company of the purchaser(s)) shall have approved at a general meeting to be convened within sixty (60) day of the date hereof approving the purchase by the purchaser(s) of the property(ies) from the vendor(s);

(e) the purchaser(s) shall where required also obtain the necessary approval or consent by resolution of the Board of Directors and/or the shareholders of the purchaser(s) to purchase the property(ies) within fourteen (14) days from the date of this agreement. The purchaser(s) warrants that it is empowered under the purchaser(s) constitution to purchase the said property(ies) from the vendor(s);

(f) in the event paras (c) and (d) above are applicable to this sale transaction and the purchaser(s) shall obtain the approvals referred to in paras (c) and (d) above within sixty (60) days of the date of this agreement unless such period aforementioned is mutually extended by the parties hereto in writing;

(g) in the further event paras (c) and (d) above are not applicable the Purchaser(s) shall inform the vendor(s) in writing within thirty (30) days of the date of this agreement;

(h) the vendor(s) shall obtain all other necessary approvals and consents, if any of such relevant authorities at the vendor(s) own cost and expense to transfer the said property(ies) in favour of the purchaser(s) or the purchaser(s) nominee(s);

(i) the vendor(s) shall endeavour to obtain all necessary undertakings and redemption statements from the current financier and ensure that the private caveats and other encumbrances are withdrawn through documentary evidence or other acceptable form of assurances to the Purchaser(s);

(j) the vendor(s) obligation to obtain and achieve the necessary approvals, consents, undertakings and assurances as provided in paras (h) and (i) shall begin one (1) week from the date written communication is received from the purchaser(s) that the purchaser(s) have fulfilled the conditions precedent contained in paras (c) and (d) above or written confirmation is received from the purchaser(s) pursuant to para (g) above that paras (c) and (d) above are not applicable;

(k) the vendor(s) shall obtain and achieve all approvals, consents, undertakings and assurances as provided in paras (h) and (i) above within one hundred and eighty (180) days from the date specified in para (j) above unless such period aforementioned is extended by the parties hereto in writing;

(l) the vendor(s) shall advise or confirm with the purchaser(s) through written communication as soon as the vendor(s) have fulfilled the Vendor(s) obligation provided in para (k) above;

(m) in the event the purchaser(s) and the vendor(s) are not able to obtain all necessary consents and approvals on the part of the purchaser(s) and the vendor(s) respectively hereunder to be obtained on or before the time period provided above or on or before such extended period, this sale transaction shall terminate and the vendor(s) shall refund and/or cause to be refunded to the purchaser(s) within one (1) week of expiry of the relevant period applicable to the purchaser(s) or the

vendor(s) to fulfil their respective obligations as provided in this Third Schedule;

(n) this sale and purchase agreement is subject to the receipt of acquisition moneys from the relevant authorities in respect of the acquisition by the relevant authorities of a portion of the lands identified as Lot No 769–772 which had taken place prior to the execution of this agreement by the parties hereto. The compensation or acquisition money shall be entitled to be received by the vendor(s) or enure to the benefit of the vendor(s) even after the completion of this sale transaction and shall be payable forthwith to the vendor(s) in the event the compensation or acquisition moneys is paid to the purchaser(s) whether prior to and/or subsequent to the completion of this sale transaction.

The defendant repudiated the SPA by letters dated 10 August 1995 and 21 August 1995 which repudiation was accepted by the plaintiff through its solicitors letter dated 21 August 1995.

THE PLAINTIFF'S CLAIM

The defendant having refused and/or neglected to refund the deposit paid by the plaintiff and to pay compensation to the plaintiff for wrongful repudiation of the SPA, the plaintiff commenced this suit against the defendant.

FINDINGS OF THE COURT

Is the repudiation wrongful?

It is not in dispute that sub-clauses (c), (d), (f) and (h) of the Third Schedule were not applicable to the sale and purchase of the lands and that the only obligation required to be fulfilled by the plaintiff under the Third Schedule of the SPA was to inform the defendant within 30 days from the date of the SPA that the approval of the Foreign Investment Committee (FIC) and the shareholders of Chew Piau Berhad (CPB) were not required for the sale and purchase of the lands (see sub-clause (g) of the Third Schedule).

Notice of non-requirement of FIC's approval

By a letter dated 19 September 1994 the plaintiff informed the defendant that the approval of the FIC was not required for the sale and purchase of the lands. However, after nearly six months of having been informed of the non-requirement of the FIC's approval, the defendant alleged for the first time by its letter dated 14 March 1995, that the notice was not given within the time stipulated in sub-cl (g) of the Third Schedule of the SPA. It is pertinent to note that the defendant did not even put to the plaintiff's witness, Dato' Pang Wee Pat, a director of the plaintiff (PW1), that the plaintiff had informed the defendant outside the time stipulated, although PW1 had testified that the plaintiff had informed the defendant that the

FIC's approval was not required for the purchase of the lands within 30 days from the date of the SPA. On this issue, the law is trite that a party must expressly put to his opponent's material witness, its own case and in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794 the Court of Appeal held that such a failure might even be treated as an abandonment of the pleaded case and that if a party, in the absence of valid reasons refrains from doing so, then he might be barred from raising it in argument.

Further I hold that by taking this challenge nearly six months late, the defendant is therefore estopped from insisting upon its right of being informed within the time stipulated under the SPA.

Notice of non-requirement of CPB's shareholders' approval

PW1 testified that the plaintiff informed the defendant that the approval of the shareholders of CPB was not required for the sale and purchase of the lands at a meeting ('the meeting') held on 14 October 1994. In fact the plaintiff's former solicitors, TG Lim & Partners had by their letter dated 18 October 1994 (CABD 33) confirmed that the defendant had no objection to the late receipt of the notice that CPB's shareholders' approval was not required and there was no immediate response to this letter.

However, about a month later, the defendant caused a letter dated 10 November 1994 to be sent to TG Lim & Partners. The said letter was said to be drafted by one Lian Gee Meng (DW3), the legal advisor of the defendant in respect of the SPA. In any case this seems to be in conflict with sub-cl (a) of the Third Schedule of the SPA, which specifically prohibited the vendor from being legally represented. By that letter the defendant did not even allege that CABD 33 was not in order and indeed no reference was even made to it. It is my finding therefore that since the said letter dated 10 November 1994 was drafted by DW3 who is an advocate and solicitor of the High Court of Malaya, it is inconceivable that if the terms in CABD 33 were not acceptable, DW3 would have failed to say so expressly. At this stage I also make a finding that DW3 has been an evasive witness. In many an instance he had retracted his earlier evidence and had to agree with the plaintiff's counsel's suggestion in cross-examination. In one instance he vehemently contended that the plaintiff had breached sub-cl (e), (f) and (g). When pressed to show how the breach had occurred, he recanted and admitted he was mistaken and thus confirmed that there was no breach. Subsequently, when asked to explain the outstanding obligation under the sale and purchase agreement that the plaintiff had failed to perform by 14 October 1994 (the date of the meeting) he confined himself to a breach of (g) only. When pressed further his answer was a classic example of equivocation. He said that as on 14 October 1994 the plaintiff was aware of the breach. Other than that he couldn't say if there was any outstanding obligation. When asked to specify the last date the plaintiff had to pay the balance of the purchase price, he pleaded ignorance. At one stage, I even noted that DW3 refused to answer a pertinent question in spite of the court itself repeating the question twice. On another occasion, when he was

A evasive and the court repeated the question twice he said he didn't understand the question. I find DW3 an unreliable witness.

Even though PW1 had testified to the effect that DW3 represented the defendant at the meeting on 14 October 1994 and had no objection to the delay in informing the defendant of the non-requirement of CPB's
B shareholders' approval, PW1 was never challenged on this.

It is my judgment therefore that the defendant is barred from raising the argument that the plaintiff did not inform the defendant of the non-requirement of CPB's shareholders' approval within the time stipulated in sub-cl (g) of the Third Schedule of the SPA. Further I also find that the
C defendant had expressly or impliedly acquiesced and waived the requirement of the need to be informed of the non-requirement of CPB's shareholder's approval within the time stipulated in sub-cl (g) of the Third Schedule of the SPA. The defendant is therefore estopped from insisting on its right to being informed within the time stipulated under the SPA. As against this, the defendant submits that the defendant neither by conduct
D nor promise led the plaintiff to believe that it had waived the non-requirement of CPB's shareholder's approval within the time stipulated in sub-clause (g), except that the defendant merely remained silent. This submission is devoid of merit. Maintaining silence is conduct. Such conduct is clearly tantamount to acquiescence. If there was to be a protest it should be registered at the earliest occasion and any delay must be
E reasonable and explainable. In this case other than admitting that it deliberately remained silent, the defendant has offered no other explanation. Waiver is therefore explicit or at the least, implied.

The defendant then raised the argument that in respect of the issue of waiver and acquiescence the plaintiff had not pleaded the same and
F therefore should not be allowed to raise the same at trial. But it is clear that the twin issues of waiver and acquiescence are admittedly within the knowledge of the defendant when the defendant admitted that it maintained silence. In *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374, the Federal Court held that there can be no waiver in the absence of an intention to waive. Since the defendant
G has admitted that it remained silent, I hold that this must be deliberate and thus saddled with the required intent.

In the circumstances, the defendant was not entitled to repudiate the SPA. Such repudiation was a breach of the SPA more so in this case when the plaintiff had fulfilled all its obligations under the SPA save and except
H for the payment of the balance purchase price which was not due at the time the defendant wrongfully repudiated the SPA.

Further, it is a fact that at the time the defendant repudiated the SPA, the defendant's obligations under sub-cl (i) of the Third Schedule of the SPA, namely, to obtain the necessary undertaking and redemption statement from its financier (Perwira Affin Bank Berhad) and the removal
I of the private caveats and other encumbrances on the lands, which the defendant was obliged to fulfil on or before 23 April 1995 had not been fulfilled.

It is not in dispute that despite numerous requests from the plaintiff, the defendant failed and/or neglected to obtain the necessary undertaking and redemption statement from its financier and the removal of the private caveats and other encumbrances on the lands within the time stipulated under sub-cl (k) of the Third Schedule of the SPA. In addition thereto, despite numerous requests from the plaintiff, the defendant also failed and/or neglected to inform the plaintiff whether the defendant had received the acquisition moneys from the relevant authorities as provided under sub-cl (n) of the Third Schedule of the SPA. I hold that the defendant was therefore not entitled to rescind the agreement. The termination of the agreement was done for a collateral purpose of avoiding its obligations and liabilities under the SPA.

DAMAGES

The defendant's wrongful repudiation was duly accepted by the plaintiff as it was entitled to do by way of its solicitors' letter dated 21 August 1995. Section 40 of the Contracts Act 1950 states as follows:

> 40 Effect of refusal of party to perform promise wholly.
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Section 7.02 of the SPA provides that:

> In the event of the vendor(s) wilfully refusing or failing to transfer the property(ies) to the purchaser(s) or its nominee or nominees free from all encumbrances in accordance with the provisions of this agreement then it is hereby agreed between the parties hereto that without prejudice to any other rights or remedies which the purchaser(s) may be entitled to against the vendor(s), the purchaser(s) shall be entitled at the purchaser(s) absolute discretion to either:
>
> (a) take such action as maybe available to the purchaser(s) at law to enforce specific performance of this agreement against the vendor(s); or
> (b) to recover from the vendor(s) a sum equivalent to twenty percentum (20%) of the purchase price herein as agreed liquidated damages in addition to the sums stated in Section II of the Second Schedule hereto and any portion of the sum stated in Section IV hereto already paid to the Vendor(s).
>
> And all costs damages and expenses incurred by the purchaser(s) in connection therewith shall be borne and paid by the vendor(s).

Agreed liquidated damages

Based on the above the plaintiff prays for a refund of the deposit, agreed liquidated damages for a sum of RM556,000 being a sum equivalent to 20% of the total purchase price (RM2,780,000). Unfortunately the plaintiff has failed to consider the effect of s 75 of the Contracts Act 1950 ('the Act') which reads as follows:

A Compensation for breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable B compensation not exceeding the amount so named or, as the case may be; the penalty stipulated for.

The plaintiff led no evidence as to any loss in respect of this claim or any part thereof. I had considered the interpretation of s 75 of the Act in *Keen Builders Sdn Bhd v Utara Dua (M) Sdn Bhd (Samudra (M) Sdn Bhd, C Garnishee)* [1998] 2 CLJ Supp 256. In that case a garnishee had entered into a building contract with the judgment debtor, whereby it engaged the latter to be the main contractor for a housing project. The agreement, inter alia, gave the garnishee the liberty to deduct RM17,080 a day 'from monies due to the judgment debtor under the contract', as liquidated ascertain damages in case of delay in the completion of the works. The judgment D creditor, whilst contending that the RM17,080 rate was a penalty by virtue of s 75 of the Act, argued in any case, that the garnishee had not proved that the said amount was a genuine pre-estimate of the damage suffered by it. I held that even if the said RM17,080 was a penalty under s 75 of the Act, the said section on the authority of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 is to be given a restrictive interpretation in E that, it is only in cases where the court would find it difficult to assess damages for actual damages or loss suffered that the court would accept the sum actually stipulated to be paid either as penalty, or liquidated damages. Since in this case before me there was no attempt at all made to prove the actual damage or loss suffered or even any part therefore, I disallow this F claim.

Refund of deposit

It is a fact that the plaintiff had indeed paid the deposit of RM556,000 which on the basis of my earlier finding has been wrongfully forfeited by the G defendant. This the plaintiff is entitled to together with interest at the rate of 4% pa from the date of forfeiture to date of judgment and costs.

THE COUNTERCLAIM

Since I had held that it was the defendant who had wrongfully terminated H the agreement, the counterclaim must therefore fail. In any case, the defendant has adduced no evidence to sustain this claim. The defendant argued that it had paid the sum of RM107,876.70 as redemption and that the last payment had been paid on 15 September 1995 and that because of the delay the defendant had to pay this extra sum amounting to RM107,876.70. However DW4 the general manager of Perwira Affin Bank I Berhad ('the Bank') testified that due to the delay by the defendant in paying the redemption sum the defendant had to pay the extra sum amounting to RM107,876.70. It is clear from the evidence that this extra

payment was made due to the defendant's own neglect or failure to pay the redemption sum within the stipulated time to the bank. In any case the defendant had defaulted on the loan since 1985, long before the SPA was signed. The counterclaim stands dismissed with costs.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar